Jam Productions, LTD and Event Productions, Inc., a single employer *and* Theatrical Stage Employees Union Local No. 2, IATSE. Case 13–CA–177838

October 29, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On May 26, 2017, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondents, the General Counsel, and the Charging Party filed exceptions and supporting briefs; the Respondents and the Charging Party filed answering briefs; and the Respondents, the General Counsel, and the Charging Party filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the stipulated record in light of the exceptions and briefs and has decided to reverse the judge's decision and to dismiss the complaint.

A. Facts

Jam Productions, Ltd. and Event Productions, Inc. are Illinois corporations that have their offices and places of business at the same location in Chicago and constitute a single employer under the Act. Jam Productions promotes and produces concerts, shows, and events by various performers at multiple venues in Chicago. Event Productions supplies labor, including stagehands, for these events. The alleged discriminatees are stagehand employees who worked at the Respondents' events at the Riviera, Park West, and Vic theaters in Chicago. Crew manager Chris Shaw was responsible for offering and assigning work to the stagehands at the Riviera Theatre; as a result, this group of stagehands was referred to as "the Shaw Crew." Shaw's practice was to call stagehands from the on-call list in order of seniority. The Respondents never provided Shaw with written policies or procedures governing how work should be offered, nor did they provide Shaw with any guidance regarding whether or not he should use seniority in making referrals.

In September 2015, certain members of the Shaw Crew distributed, signed, and collected union authorization cards. On September 16, 2015, the Respondents discharged the Shaw Crew and, a few days later, hired Behrad Emami to replace Shaw as crew manager.[1] Emami thereafter hired approximately 25–30 stagehand employees (the "New Riviera Crew"). On September 17, 2015, Theatrical Stage Employees Union Local No. 2, IATSE (the Union) filed a petition to represent the stagehands employed at the Riviera, Park West, and Vic theaters. The following day, the Union filed an unfair labor practice charge in Case 13–CA–160319, alleging that the Respondents had discharged the Shaw Crew in retaliation for their protected activity.[2]

Beginning in December 2015, the General Counsel and the Respondents engaged in settlement negotiations to resolve the allegations in Case 13–CA–160319. During negotiations, the General Counsel repeatedly proposed that the Shaw Crew be offered "immediate and full participation in the on-call list without discrimination because of their union membership or support for the Union and without prejudice to their seniority or any other rights and/or privileges previously enjoyed."[3] The Respondents repeatedly rejected the proposals that the Shaw Crew be reinstated with "seniority or any other rights and/or privileges previously enjoyed," and further objected to either discharging the New Riviera Crew or giving the Shaw Crew any seniority or preferential treatment over the New Riviera Crew.

After several rounds of back-and-forth negotiations, on March 16, 2016, the General Counsel informally agreed to terms of a settlement agreement. The agreement included a nonadmissions clause, provided for backpay, and required the Respondents to offer the Shaw Crew "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theaters from October 4, 2014, to September 21, 2015, or if those jobs no longer exist, to substantially equivalent positions, without discrimination because of their union membership or support for the Union, and offer them work in a

[1] Emami is a stipulated supervisor within the meaning of Sec. 2(11) of the Act.

[2] Following a representation election held on May 16, 2016, the Regional Director for Region 13 certified the Union on June 20, 2016. On January 5, 2017, the Board denied the Respondents' request for review of the Regional Director's Corrected Report on Objection and Challenges and Certification of Representative. On May 16, 2017, the Board found that the Respondents violated Sec. 8(a)(5) and (1) by failing and refusing, since June 20, 2016, to recognize and bargain with the Union. *Jam Productions, Ltd.*, 365 NLRB No. 75 (2017). On May 17, 2017, the Respondents filed a Petition for Review of the Board's decision with the United States Court of Appeals for the Seventh Circuit. On June 28, 2018, the court granted the Respondents' petition and remanded the case back to the Board for a hearing on objections. That case is pending before the Board as of the date of today's decision. The outcome does not affect our result here.

[3] An earlier version proposed that the Shaw Crew be offered "immediate and full reinstatement," but the Region changed this to "immediate and full participation."

non-discriminatory manner." The agreement did not include a seniority provision, nor did it refer to the New Riviera Crew.

On March 28, 2016, the Respondents signed the settlement agreement. Thereafter, Respondent Jam Productions sent a memo to Emami instructing him to offer the Shaw Crew "immediate and full participation in the on-call list" in a "completely non-discriminatory manner." As the judge found, Emami believed that "full participation" by members of the Shaw Crew meant that they would share the work equally with the New Riviera Crew members. The Shaw Crew comprised 47 percent of the on-call list while the New Riviera Crew comprised 53 percent. Emami made 54 percent of his offers to the Shaw Crew and 46 percent to the New Riviera Crew. Almost all of the Shaw Crew received fewer offers than they had received prior to the discharges.

On April 4, 2016, the Union sent an email to the General Counsel stating its objections to the settlement agreement. In particular, the Union criticized the agreement's inclusion of the nonadmissions clause and failure to require that the Shaw Crew be offered work from the on-call list based on their seniority. In response, the General Counsel told the Union that the seniority and past privileges and rights language it wanted to include in the agreement was "implicitly addressed" by the agreement's non-discrimination provision.[4] Subsequently, on April 6, 2016, the Regional Director for Region 13 approved the informal settlement agreement over the objections of the Union.

On June 7, 2016, the Union filed a charge based on the Respondents' implementation of the settlement agreement. On October 28, 2016, the General Counsel filed the instant complaint, alleging that the Respondents violated Section 8(a)(4), (3), and (1) of the Act when they "failed to offer and assign work on a non-discriminatory basis" to members of the Shaw Crew because, among other reasons, they had been named as discriminatees in the settlement agreement. The complaint seeks an Order requiring the Respondents, among other things, to assign members of the Shaw Crew to work assignments in the same order and with the same frequency as prior to September 21, 2015, without any loss in their seniority or benefits.

B. Judge's Decision

The General Counsel argued to the judge that the Respondents were required to fully restore the status quo as it existed before the Shaw Crew was terminated by offering work to the Shaw Crew stagehands before offering it to the New Riviera Crew. In other words, the Shaw Crew must be given seniority over the New Riviera Crew. The Respondents, in turn, contended that the parties agreed on the plain terms of the settlement agreement, which does not include a seniority hiring requirement, and that their reinstatement of the Shaw Crew on an equal basis with the New Riviera Crew was in accordance with the terms of the agreement and was not discriminatory.

Noting the absence of any reference to "seniority and any other rights and/or privileges previously enjoyed" in the agreement, the judge determined that the phrase "immediate and full participation in the on-call list" was ambiguous and susceptible of more than one interpretation.

The judge concluded that both the General Counsel's and the Respondents' interpretations of the agreement were reasonable. He further found the extrinsic evidence inconclusive as to what the parties intended in the settlement agreement. He noted that, although the General Counsel had agreed to the removal of any seniority requirement, the General Counsel later opined to the Union that the agreement's nondiscrimination provision preserved the Shaw Crew's seniority rights. Based on this, the judge found that the parties did not have the necessary meeting of the minds to establish an agreement. Accordingly, the judge set the settlement agreement aside, reinstated the charges in Case 13–CA–160319, and, together with the charges here, remanded both cases to the Division of Judges for trial. For the reasons explained below, we reverse.

C. Discussion

First, we disagree with the judge's finding that the settlement agreement is ambiguous as to whether the Shaw Crew is entitled to seniority on the on-call list. Nothing in the agreement requires the Respondents to offer work to the Shaw Crew based on seniority or with other privileges over the New Riviera Crew. Rather, it requires that the Shaw Crew be given "full participation" in the on-call list, with no privileges beyond that, and no reference to reinstatement, hiring preference over or replacement of New Riviera Crew stagehands, or other language that would typically be expressly included in order to fully restore the status quo ante.[5] That the settlement agreement is silent on its face regarding seniority rights and past privileges indicates that the parties specifically

[4] The General Counsel did not communicate this interpretation of the settlement agreement to the Respondents.

[5] See *Sansla, Inc.*, 323 NLRB 107, 109 (1997) (citing "'well-established general rule'" that where the parties to a contract have agreed to put the terms of their agreement into writing, "'it is conclusively presumed that the entire engagement of the parties, and the extent and manner of their undertaking, have been reduced to writing'") (quoting 30 Am. Jur. 2d *Contracts* §1016 (1967)).

agreed not to include such requirements.[6] Similarly, the lack of reference to the New Riviera Crew indicates that the parties deliberately chose not to give the Shaw Crew any specific rights superior to the other stagehands.

Second, to the extent that it might be relevant to refer to extrinsic evidence in interpreting the language of the agreement, the history of negotiations confirms that the parties did not intend to give the Shaw Crew seniority rights over the New Riviera Crew. In order to reach a settlement, the General Counsel agreed to remove seniority language from the agreement that would have required the Respondents to offer work to all members of the Shaw Crew before offering work to the New Riviera Crew. The Respondents had repeatedly made it clear that they would not agree to a seniority requirement. The parties reached a meeting of the minds when the General Counsel agreed to remove that requirement from the agreement.[7] The General Counsel now contends that we should imply a seniority requirement that he specifically agreed not to include in order to reach settlement, and, consequently, that we should find that the Respondents violated the Act by failing to act in accordance with the agreement that the Region negotiated. This implication is not warranted. As both the terms of agreement and the extrinsic evidence make clear, the General Counsel's arguments are not consistent with the parties' agreement.[8]

In light of the above, we find that reinstatement with seniority rights or other preferences was deliberately excluded from the settlement agreement and that, therefore, the Respondents' offers of work to the Shaw Crew on an equal basis as the New Riviera Crew did not violate Section 8(a)(3), (4), and (1) of the Act.[9] Accordingly, we reverse the judge and dismiss the complaint.

ORDER

The judge's order to set aside the settlement agreement in Case 13–CA–160319 is rescinded and the complaint is dismissed.

Dated, Washington, D.C. October 29, 2018

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] See, e.g., *Postal Service*, 348 NLRB 25, 25 (2006) (where settlement agreement required parties to arbitrate pending grievances regarding unit-placement issues, but was silent on rights and obligations in the event a party disagreed with arbitration results, employer was not estopped from filing unit clarification petition to challenge a resulting arbitral decision); *Local Union 613, Electrical Workers*, 227 NLRB 1954, 1955, 1957 (1977) (settlement agreement requiring union to "place [alleged discriminatees] on a preferential list and refer them to the first available employment with any NECA contractor" did not require union to place them with any particular contractor, guarantee employment of any specific duration or at preferred locations, or refer them at the expense of other registrants).

[7] Further, the fact that the General Counsel opined to the Union that seniority rights were implicitly reserved in the settlement agreement—a view the General Counsel did not communicate to the Respondents—does not indicate that there was no meeting of the minds. This exchange occurred after the parties had signed the agreement, the General Counsel knew full well that the Respondents would not have agreed to settle were there a seniority requirement, and the General Counsel expressly agreed to remove it. See, e.g., *MK-Ferguson Co.*, 296 NLRB 776, 776 fn. 2 (1989) ("Whether a meeting of the minds was reached is determined not by the parties' subjective inclinations, but by their intent as objectively manifested in what they said to each other.").

[8] We find no merit in the General Counsel's argument that the provision requiring "full participation" in the on-call list is identical to a full *reinstatement* remedy that would restore the status quo and require the Respondents to give the Shaw Crew seniority or other privileges over the New Riviera Crew, particularly given that the parties expressly agreed not to include any such requirement in the agreement. Cases cited by the General Counsel to argue that the agreement must restore the status quo are inapposite and involve 8(a)(5) violations where, unlike here, the remedies specifically require restoration of the status quo. E.g., *J. E. Brown Electric*, 315 NLRB 620 (1994). There, where the respondent repudiated contractual hiring-hall provisions in violation of Sec. 8(a)(5), the remedy necessarily restored the status quo, which was established by contract. Id. at 623. Here, in contrast, the Respondents' obligations have been established by a negotiated settlement agreement that does not expressly or implicitly restore the status quo ante and contains a nonadmissions clause. For this reason, our dissenting colleague's focus on the fact that the Shaw Crew members received less work than they had previously is misplaced. Finally, while the Union contends on brief that the hiring conflicts with the nondiscrimination requirement, the General Counsel's specific agreement with the Respondents, and the nonadmissions clause, establish a clear meeting of the minds that is consistent with the Respondents' post-settlement hiring practices.

[9] We disagree with our colleague that the Respondents' recall of the Shaw Crew on an equal basis as the new hires is "inherently destructive" of the Shaw Crew's Section 7 rights and that the case should be remanded. The Respondents reinstated the Shaw Crew without seniority considerations pursuant to the negotiated terms of the Settlement Agreement, a fact that our colleague discounts as "beside the point." To relieve the General Counsel from the terms of a settlement agreement to which he voluntarily agreed—as our colleague suggests we do—would dissuade parties from negotiating settlements and contravene the Board's long held policy of encouraging the "peaceful, nonlitigious resolution of disputes" through compromises and settlements. *UPMC*, 365 NLRB No. 153, slip op. at 3 (2017) (quoting *Independent Stave*, 287 NLRB 740, 741 (1987)).

MEMBER MCFERRAN, dissenting.

The Respondents fired 55 of their stagehands—an entire work crew (the Shaw Crew)—the day before the Union filed a petition seeking to represent them. The Respondent then hired a crew of replacement employees (the New Riviera Crew). Not surprisingly, the Union filed an unfair labor practice charge challenging the mass discharge as discriminatory. That charge led to a settlement between the General Counsel and the Respondents, which agreed to provide backpay for the discharged stagehands, to offer them "immediate and full participation in the on-call list for work," and to "offer them work in a non-discriminatory manner." The issue in the present case (as framed by the General Counsel's complaint) is whether the Respondents violated Sections 8(a)(3) and 8(a)(4) of the National Labor Relations Act by "fail[ing] to offer and assign work on a non-discriminatory basis" to the discharged stagehands, the Shaw Crew employees. As did the administrative law judge, the majority misconstrues both the General Counsel's theory of the present case and the relationship between this case and the prior, settled case. Today's case does not turn on the interpretation of the earlier settlement agreement, nor must that agreement be set aside (as the judge determined) before the General Counsel may proceed. The question, rather, is whether the method used by the Respondents to assign work after the settlement conformed to the Act or whether, as the General Counsel argues, it was "inherently destructive" of employees' Section 7 rights, in the Supreme Court's formulation.[10] The majority thus errs in dismissing the General Counsel's complaint alleging a statutory violation, based on its own interpretation of the settlement agreement.

As the judge found, and the majority explains, after the settlement, the Respondents decided that members of the discharged Shaw Crew would share work equally with their replacements, the members of the New Riviera Crew. This target was essentially met: 54 percent of job offers went to the Shaw Crew. Even so, almost all Shaw Crew members received *fewer* job offers than they did before they were fired. And, of course, the equal-share rule meant that (in principle) there was a cap on the number of job offers that Shaw Crew members as a group could receive: i.e., not more than half. Moreover, the very premise of the rule was that Shaw Crew members—the employees who had sought union representation and who were discharged—would be treated *as* a group, a group effectively defined by union status.

In these circumstances, the General Counsel's "inherently destructive" theory of discrimination is viable, to say the least. The Board has found job-bidding policies that restricted employees' opportunities based on their union status to be inherently destructive of Section 7 rights and thus unlawful, even absent proof of anti-union motivation. In *Honeywell, Inc.*, 318 NLRB 637 (1995), for example, the Board struck down an employer policy that precluded employees covered by a collective-bargaining agreement from bidding on certain job vacancies. Such a policy, the Board explained, "necessarily discourages union membership because the message to employees is that choosing union representation is risky because that choice can be used to discriminate against you. . . ." Id. at 638. The *Honeywell* Board found, in turn, that the employer had failed to carry its burden to prove that the discriminatory policy was motivated by legitimate and substantial business justifications. Id.[11]

Instead of permitting the General Counsel to pursue his complaint, the majority dismisses it. Perhaps the majority is led astray by the administrative law judge's own error here: he mistakenly ordered the settlement agreement set aside (and reinstated the original unfair labor practice charges attacking the discharge of the Shaw Crew), based on his finding that there had been no meeting of the minds between the General Counsel and the Respondents with respect to whether *the agreement* required that the Shaw Crew stagehands be given seniority over the New Riviera crew. But here, the General Counsel has not asked that the settlement agreement be set aside, in order that he might pursue the original (settled) charges.[12] As explained, the gravamen of the current complaint, based on a new unfair labor practice charge, is that the Respondent's chosen method of assigning work after the settlement *violated the Act*. The General Counsel is correct, then, when he argues that "[i]n his decision, the [judge] failed to address the central issue in this case."[13]

The majority seems to make the same mistake. Its decision focuses entirely on interpreting the settlement agreement. The majority asserts that *because* "reinstatement with seniority rights or other preferences was deliberately excluded from the settlement agreement," the Respondent's "offers of work to the Shaw Crew on

[10] *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). See, e.g., *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 3 (2018) (explaining *Great Dane* analytical framework).

[11] See also *Legacy Health System*, 355 NRB 408, 408 fn. 3 (2010) (dicta), affirming and incorporating 354 NLRB 337 (2009) (addressing employer policy prohibiting employees from simultaneously holding both part-time bargaining-unit and nonbargaining-unit positions, thus limiting employees' future job opportunities based on initial hire into bargaining-unit position).

[12] For such a case, see *Nations Rent*, 339 NLRB 830 (2003).

[13] Counsel for the General Counsel's Exceptions and Brief in Support at p. 9 (July 10, 2017).

an equal basis as the New Riviera Crew did not violate . . . the Act." Simply put, this conclusion does not follow from the premise. Whether or not the agreement compelled the Respondent to give the Shaw Crew employees seniority—to prefer them over the Riviera Crew employees for work assignments—is beside the point. The question instead is whether the Respondent's chosen method of assigning work (purportedly implementing the settlement) violated the Act, because it discriminatorily limited the job opportunities of the Shaw Crew employees. At a minimum, those employees each were statutorily entitled to be assigned work regardless of their union support or affiliation, based on some neutral rule (such as seniority or random assignment) that did not include a discriminatory cap on assignments predicated on their union status.

The settlement agreement, of course, could not possibly be read either to compel or to condone a statutory violation.[14] The majority does not attempt to argue otherwise. There is no suggestion here that the General Counsel affirmatively agreed to the Respondent's equal-share rule based on union status or that the General Counsel somehow waived the right to challenge the means chosen by the Respondents to implement the settlement agreement, even if it violated the Act.[15] Under the circumstances, then, I would remand the case to the administrative law judge, with instructions to address the General Counsel's theory of the case, to determine whether the Respondent's equal-share rule violated the Act, and, if so, to devise an appropriate remedy for that violation.

Dated, Washington, D.C. October 29, 2018

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[14] See *First National Supermarkets*, 302 NLRB 727, 727–728 (1991) (rejecting interpretation of settlement agreement that would create unlawful interference with statutory right to file unfair labor practice charges). See also *Formby-Denson v. Dept. of Army*, 247 F.3d 1366, 1377–1378 (Fed. Cir. 2001) (rejecting interpretation of settlement agreement that would require violation of public policy).

[15] As noted above, the majority is simply mistaken when it asserts that the General Counsel seeks to be "relieve[d] . . . from the terms of a settlement agreement to which he voluntarily agreed." The settlement agreement in this case did not incorporate the Respondent's equal-share rule based on union status, which the General Counsel challenges as violating the Act. The question, then, is not whether the settlement agreement should be set aside or how the settlement agreement should be interpreted, but whether the Respondent violated the Act in purported compliance with the agreement. The Board's policy of encouraging settlements, cited by the majority, does not create a license to violate the statute.

Kevin McCormick, Esq., for the General Counsel.
Greg Shinall, Esq. (Sperling & Slater), and *Steven L. Gillman (Holland & Knight LLP),* of Chicago, Illinois, for the Respondent.
David Huffman-Gottschling, Esq. (Jacobs, Burns, Orlove & Hernandez), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried on a stipulated record. Theatrical Stage Employees Union Local No. 2, IATSE (the Union) alleges that Respondents, Jam Productions, Ltd. (Jam) and Event Productions, Inc. (Event Productions) violated Section 8(a)(4), (3) and (1) of the National Labor Relations Act (the Act)[1] by failing to reinstate 55 stagehands in accordance with the settlement agreement in a prior Board proceeding relating to their mass termination. The primary issue in this case is whether the phrase, "immediate and full participation in the on-call list," required a return to the status quo ante, thus giving the 55 stagehands seniority or other preference over the stagehands who replaced them, or simply the right to be offered work assignments equally with their replacements.

On the entire record, including my consideration of the stipulated record and the briefs filed by the General Counsel, the Respondent and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Jam is an Illinois corporation with an office and place of business in Chicago, Illinois, is engaged in the business of promoting and producing concerts, shows, and events by various performers, at various venues in Chicago, Illinois. Event Productions, Inc., an Illinois corporation with an office and place of business at the same location, has been engaged in the business of supplying labor, including stagehands, for concerts, shows, and events by various performers at venues in Chicago, Illinois., Jam and Event Productions are a single-integrated business enterprise and a single employer within the meaning of the Act, and are employers engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Shaw Crew

For many years prior to September 16, 2015, Chris Shaw was a part-time employee of Event Productions, with day-to-day responsibilities as the crew manager in charge of offering and assigning work to part-time stagehands at the Riviera Theatre (the Riviera). He reported to Nick Miller (a Vice President and the head talent buyer for the club department at Jam) and/or Kevin Lynch (the production manager at the Riviera). Neither Event Productions nor Jam provided Shaw with written policies or procedures governing how he or any other crew manager or

[1] 29 U.S.C. §§ 151–169.

production manager should offer and assign work to the part-time stagehands at the Riviera. Moreover, neither Event Productions nor Jam authorized or requested Shaw to use a system providing seniority or any other privileges to stagehands based on length of service.

Prior to September 16, 2015, Shaw typically assigned stagehands from the aforementioned group of part-time employees to fill the crews for shows at the Riviera (the Shaw Crew): Danny Alvarez, Mike Alvarez, James Bartolini, Karlis Baumanis, Brent Benson Jr., Lester Berry, Edward J. Bilecki, Scott Bulawa, Todd Carter, Christopher C. Chambers, Don Corney, Nick Curry, Alek Dombrovskis, Jerome Fritz, Zachary Fritz, Tom Garrity, Willie Gee, Christopher Glazebrook, Bryan Gonzalez, Sean D. Gunn, Justin Huffman, Joe Kelly, Gregor Kramer, Chris Leggett, Joe Lyons, Bryan Mangnall, Michael Mulvey, Quintin Muntaner, Bertil Peterson, Chris Phipps, Martin Pollack, Paul Repar, Adam Ross, Tom Roszel, Eric D. Sanders, Brad Sikora, Louis Svitek Jr., Gabriel Thompson, Paul Wright, Archie Yumping, Steph Tremius, Devonte Jackson, Charlie Naese, James Curry, Evon Peterson, Kristopher Brumnell, Joe McNulty, Tim Taylor, Ken Kinder, Mike Howe, Kasia Kozsiol, Eric Pospishil, Louis Svitek IV, Dan May, and Peter Falk.

Prior to September 16, 2015, Shaw typically assigned employees from the Shaw Crew to Riviera events after receiving a call and an "Advanced Sheet" from Lynch telling him how many people were needed for the event. Shaw usually called crew members in order of seniority, with few exceptions. An example where talent superseded seniority was when a sound monitor controller was needed. Shaw would generate a Jam payroll timesheet for each show, recording the hours worked and entering the hourly pay rates established by Jam. Before or during the show, Shaw would hand the timesheet to Lynch, who would initial it along with the band production manager and submit it to the Jam talent buyer. Based on those timesheets, Jam would issue paychecks to the Shaw Crew members.[2] Shaw's only other responsibilities as crew leader was to purchase performance related supplies, for which he was reimbursed. Major equipment purchases, on the other hand, were made by the Riviera's building engineer.

On September 16, 2015, Respondents discharged Shaw and the rest of the Shaw Crew from working shows at the Riviera. However, certain of these employees were permitted to work at previously-assigned shows at the Riviera on September 18 and 21, 2015 (and other previously-assigned events outside of the Riviera). Thus, the last day of employment at the Riviera for the employees who worked the September 18 and 21, 2015, shows was either September 18 or 21, 2015, respectively.

On September 22, 2015, Event Productions hired Behrad Emami to replace Lynch as production manager and Shaw as crew manager at the Riviera. Between September 22 and 25, 2015 Emami worked with Shaw and Lynch to put together a crew for his first show on September 25, 2015. Thereafter, Emami typically assigned stagehand employees to work shows at the Riviera using a list of stagehands that he and Jason Plahutnik developed based on their experience working with stagehands at other area venues (the "New Riviera Crew"). There were 25 to 30 crew members on the initial New Rivera Crew list.[3]

B. The Previous Litigation

During an undetermined period of time, certain Shaw Crew members, including Justin Huffman, distributed, signed and/or collected union authorization cards.[4] On September 17, 2015, the Union filed a petition with the National Labor Relations Board, Region 13, to represent the following individuals employed at the Riviera, Park West Theater and Vic Theater:

> All full-time and regular part-time stage production employees employed by the Employer at the Riviera, Park West, and Vic Theatres, but excluding production managers and crew leaders, office clerical employees and guards, professional employees and supervisors as defined in the Act.

On September 18, 2015, the Union filed a charge in Case 13–CA–160319 alleging that Respondents discharged the aforementioned Shaw Crew employees in retaliation for their protected activity. On March 4, 2016, a Second Amended Complaint issued in Case 13–CA–160319, alleging that Respondents discharged the Shaw Crew employees in violation of the Act.

On April 6, 2016, the Regional Director of Region 13 approved a settlement agreement and notice to employees in Case 13–CA–160319. The following employees, comprising the Shaw Crew, were named in that settlement agreement: Danny Alvarez, Mike Alvarez, James Bartolini, Karlis Baumanis, Brent Benson Jr., Lester Berry, Edward J Bilecki, Scott Bulawa, Todd Carter, Christopher C Chambers, Don Corney, Nick Curry, Alek Dombrovskis, Jerome Fritz, Zachary Fritz, Tom Garrity, Willie Gee, Christopher Glazebrook, Bryan Gonzalez, Sean D Gunn, Justin Huffman, Joe Kelly, Gregor Kramer, Chris Leggett, Joe Lyons, Bryan Mangnall, Michael Mulvey, Quintin Muntaner, Bertil Peterson, Chris Phipps, Martin Pollack, Paul Repar, Adam Ross, Tom Roszel, Eric D Sanders, Brad Sikora, Louis Svitek Jr., Gabriel Thompson, Paul Wright, Archie Yumping, Steph Tremius, Devonte Jackson, Charlie Naese, James Curry, Evon Peterson, Kristopher Brumnell, Joe McNulty, Tim Taylor, Ken Kinder, Mike Howe, Kasia Kozsiol, Eric Pospishil, Louis Svitek IV, Dan May, and Peter Falk. In the accompanying Notice to Employees (Notice), Respondents agreed, among other things, to offer the Shaw Crew "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner."

The provision requiring Respondents to offer the Shaw Crew

[2] The timesheets also identify employees not listed in the aforementioned Shaw Crew who filled positions for shows other than stagehand, e.g., runner, hospitality, production, and crew call.

[3] Jt. Exh. 24 at 1–4.

[4] Justin Huffman was also the sole member of the Shaw Crew to appear at the subsequent Representation Case hearing; and he was the Union's sole observer at each of the two sessions of the union election. There is no indication in the record, however, as to when the he and others distributed, signed and collected authorization cards.

"immediate and full participation in the on-call list for work without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner" was, along with other provisions in the settlement agreement, the subject of several rounds of back-and-forth negotiation.

Initially, Region 13 proposed that the Shaw Crew be offered "immediate and full participation in the on-call list without discrimination because of their union membership or support for the Union and without prejudice to their seniority or any other rights and/or privileges previously enjoyed, if any." Respondents rejected Region 13's proposal that the Shaw Crew be reinstated with "seniority or any other rights and/or privileges previously enjoyed." Respondents objected to discharging the New Riviera Crew or to giving the Shaw Crew any seniority or preferential treatment over the New Riviera Crew. The Region ultimately agreed to the terms and language proposed by Respondents for the reinstatement and recall of the Shaw Crew employees, including backpay for the period of October 4, 2014, to September 21, 2015.

Respondents signed the Settlement Agreement and Notice to Employees on March 28, 2016. The settlement included a non-admissions clause stating that, "[b]y entering into this Settlement Agreement, the Charged Parties do not admit to having violated the act." On the same date, Jerry Mickelson, Jam's Chairman, Vice President and Secretary, sent a Memorandum to Emami implementing the foregoing provision of the Notice.[5] Mickelson's Memorandum stated, in pertinent part:

> As part of that settlement, the companies have agreed that, effective now, you, as the person who hires stagehands for [Riviera] . . . will offer the . . . former [Shaw] crew (names are listed below) "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre from October 4, 2014 to September 21, 2015 without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner.
>
> . . . To be clear, you may hire whomever you think is best and appropriate for jobs. But union support or membership, or lack of support or membership in the union, may not play *any* role—NONE—in the hiring decisions you make. *And* you have to give fair consideration to Jolly's former crew. No doubt, you have people whom you are now using whom you know and trust. But in order to be fair to [Shaw's] former crew, I want you to make sure that you give people a chance – especially people who were most active at the [Riviera]. In order to show your and our good faith in this, I would like you to make a particular effort to choose among [Shaw's] former crew as stagehands for the immediately upcoming [Riviera] shows on April 1 (if possible), 7, 14, 15 and 16. . . . You must make sure that you *continue* to hire stagehands in a completely non-discriminatory manner. (Emphasis in original.)[6]

On April 4, 2016, counsel for the Union sent the General Counsel an email objecting to the proposed settlement in Case 13–CA–160319, specifically, the agreement's inclusion of a non-admissions clause and failure to mention the Shaw Crew's seniority rights upon reinstatement. The General Counsel responded the same day, explaining that the settlement agreement's non-discrimination provision fully remedied the alleged unfair labor practices. Neither communication was provided to Respondents in connection with the Settlement Agreement. The Region subsequently approved the Settlement Agreement and Notice over the Union's objection.

On April 5 and 6, 2016, Respondents requested that the Region provide current contact information for the Shaw Crew so they could be offered work. On April 8, 2016, the Region sent Respondents the final backpay calculations for the Settlement Agreement.

C. Shaw Crew Employees Are Recalled

After receiving the March 28, 2016 memorandum from Mickelson, Emami began offering and assigning work to the former Shaw Crew employees. Emami proceeded with the belief that "full participation" by members of the Shaw Crew meant that they would share the work equally with the New Crew employees. Emami was not otherwise instructed on how to offer work to the Shaw Crew members, except to "make an effort to use those listed as the 'most active.'"[7] In this regard, Emami kept a log reflecting the events at the Riviera, the name of each person he contacted to work that event, how he contacted the individual (text or call), the date and time of the contact, whether he succeeded in making contact, and the individual 's response.[8]

From the combined group of employees that Emami had to pick from, the Shaw Crew comprised 47 percent and the New Riviera Crew amounted to 53 percent of the group. Emami subsequently made 54 percent of his offers to the Shaw Crew and 46 percent to the New Riviera Crew. The Shaw Crew's most utilized stagehands—Gregor Kramer, Paul Repar, Archie Yumping and Justin Huffman—received the most offers. Nevertheless, Emami's logs indicate that they too received fewer opportunities after reinstatement. Kramer previously worked 97 percent of shows, but was called by Emami for 74 percent of shows; Huffman previously worked 80 percent of shows, but Emami called him only half of the time. Almost all of the rest of Shaw Crew received less calls after reinstatement. Overall, Shaw Crew members filled 48 percent of the all-day slots and 46 percent of the total slots.

In some instances, Shaw Crew contacted by Emami refused offers of employment or were unavailable. Some informed him that they were unavailable due to scheduling conflicts with work assignments for employers other than Respondents; one Shaw Crew member, Archie Yumping ignored Emami's offers

[5] The parties stipulated that Mickelson and Emami acted as supervisors within the meaning of Sec. 2(11) of the Act and agents within the meaning of Sec. 2(13) of the Act on behalf of Jam and Event Productions, respectively.

[6] The lists attached to Mickelson's memorandum identified 22 individuals as "Most Active Working Riv Shows" and 24 individuals as "Additional Crew Available To Work." (Jt. Exh. 19.)

[7] Jt. Exh. 24 at 4–10.

[8] Jt. Exh. 27.

of employment; Gabriel Thompson relocated to another state; Brent Benson has a serious medical condition that prevents him from working; and Brad Sikora passed away

D. Charges Are Filed After Respondents Recall Shaw Crew Members

On June 7, 2016, the Union filed an unfair labor practice charge against Respondents in Case 13–CA–177838 alleging that they failed and refused to offer the Shaw Crew employees "full participation in the on-call list because of their protected, concerted, union activity; in retaliation for their being named discriminatees in the complaint and settlement agreement; and in violation of the terms of the settlement agreement."

On July 13, 2016, the Regional Director notified the Union that Region 13 would not pursue the charge:

> We have carefully investigated and considered your charge [and) [f]rom the investigation, the evidence is insufficient to show that the Employer has failed and refused to offer the employees named as discriminatees in Case 13-CA-160319 full participation in the on call list for work assignments, as required by the settlement agreement that was reached in that case, because of their engagement in protected concerted or union activity, or because they were named as discriminatees in the Complaint or Settlement Agreement. Further, the evidence is insufficient to show that the Employer is in violation of the express terms of the settlement agreement reached in Case 13-CA-160319.

The Charging Party appealed the dismissal of charges in Case 13–CA–177838. On October 19, 2016, after considering the Charging Party's appeal as a request for reconsideration and newly submitted evidence, the Regional Director reversed his decision and revoked the dismissal of charges.

LEGAL ANALYSIS

The General Counsel and Charging Party contend that Respondents unlawfully discriminated against Shaw Crew members in violation of Sections 8(a)(4), (3), and (1) by reducing their work hours and, thus, denying them "immediate and full participation" upon reinstatement after the settlement of Case 13–CA–160319. Respondents insist that the Shaw Crew employees were reinstated in accordance with the terms of the settlement and were afforded work opportunities at the Riviera Theatre through the on-call list in a nondiscriminatory manner.

The resolution of the unfair labor practice allegations depends on an interpretation as to what the General Counsel and Respondents intended by the "immediate and full participation in the on-call list" by Shaw Crew employees in the settlement agreement in Case 13–CA–160319.

Respondents highlight the settlement discussions between the parties in Case 13–CA–160319 that resulted in a settlement agreement over the objection of the Union. The Union specifically objected to the inclusion of a non-admissions clause and the omission of a provision assuring the reinstated Shaw Crew employees of seniority in the on-call list.

In his brief, the General Counsel objected to the admissibility of settlement discussions in determining the meaning of the settlement agreement. Those discussions, in the form of emails exchanged between counsels in Case 13–CA–160319, are relevant and admissible for two reasons. First, to the extent that the General Counsel objection relies on the inadmissibility of evidence of settlement related discussions pursuant to FRE Rule 408, that argument lacks merit. Evidence of discussions relating to a settlement agreement is admissible in determining the meaning of its contents. *Basha v. Mitsubishi Motor Credit of America, Inc*., 336 F.3d 451 (5th Cir. 2003) (settlement-related letters between parties admissible where not used to establish liability, but, rather, to interpret parties' settlement agreement); *Central Soya Co., Inc. v. Epstein Fisheries, Inc.,* 676 F.2d 939, 944 (7th Cir. 1982) (explaining that evidence relating to a settlement is admissible to explain the settlement's terms).

Second, the parties reasonably disagree as to whether "immediate and full participation in the on-call list" requires a return to the on-call list previously used for the Shaw Crew or simply inclusion into an on-call list with the New Riviera Crew. As it relates to "seniority and any other rights and/or privileges previously enjoyed" by Shaw Crew employees, the phrase is silent and thus unclear or susceptible of more than one interpretation. In a case where the wording of a provision is ambiguous, as it is here, the Board applies established rules of contract interpretation and considers extrinsic evidence. *Sanitation Salvage Corp.*, 342 NLRB 449, 451–452 (2004), citing *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1037 (2003); *Sansla, Inc.*, 323 NLRB 107, 109 (1997).

The extrinsic evidence in this record, however, is also inconclusive as to what the parties intended in the settlement agreement. Respondents rely on the General Counsel's inclusion of seniority language in the initial draft of the settlement agreement and its removal from the final version of the agreement, over the Union's objection, after Respondents rejected that language. On the other hand, there is evidence that the General Counsel, in responding to the Union's objection, expressed his opinion that the final version of the settlement agreement preserved the Shaw Crew's seniority rights notwithstanding the omission of specific language to that effect.

The patent ambiguity of the requirement that Respondents provide the Shaw Crew with "immediate and full participation in the on-call list" is further evident from the agreement to make whole the Shaw Crew employees for the entire backpay period, while omitting any reference to the rights of the New Riviera Crew that replaced the Shaw Crew members during that period. Indeed, the settlement agreement fails to mention the New Riviera Crew in any way.

The Board has always encouraged voluntary settlements of unfair labor practice claims. Based on the evidence, however, it is evident that there was no meeting of the minds as to Respondents' obligations under the settlement agreement in Case 13–CA–160319 upon which the parties premises their theories of this case. Accordingly, it will be recommended that the Board set aside the settlement in Case 13–CA–160319, reinstate those allegations, and remand that case to the Division of Judges for a trial of both the reinstated allegations and those in the instant complaint, and to make the necessary findings, analysis, and conclusions of law. See *Doubletree Guest Suites Santa Monica*, 347 NLRB 782, 784 (2006), citing *Howard Electrical & Mechanical*, 293 NLRB 472, 472 fn. 2, 490 (1989), enfd. mem. 931 F.2d 63 (10th Cir. 1991).

CONCLUSIONS OF LAW

1. Respondents Jam Productions, Ltd. and Event Productions, Inc. are a single-integrated business enterprise and a single employer within the meaning of the Act, and are employers engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On September 16, 2015, the following employees, collectively referred to as the Shaw Crew, were discharged by Respondents: Danny Alvarez, Mike Alvarez, James Bartolini, Karlis Baumanis, Brent Benson Jr., Lester Berry, Edward J Bilecki, Scott Bulawa, Todd Carter, Christopher C Chambers, Don Corney, Nick Curry, Alek Dombrovskis, Jerome Fritz, Zachary Fritz, Tom Garrity, Willie Gee, Christopher Glazebrook, Bryan Gonzalez, Sean D Gunn, Justin Huffman, Joe Kelly, Gregor Kramer, Chris Leggett, Joe Lyons, Bryan Mangnall, Michael Mulvey, Quintin Muntaner, Bertil Peterson, Chris Phipps, Martin Pollack, Paul Repar, Adam Ross, Tom Roszel, Eric D Sanders, Brad Sikora, Louis Svitek Jr., Gabriel Thompson, Paul Wright, Archie Yumping, Steph Tremius, Devonte Jackson, Charlie Naese, James Curry, Evon Peterson, Kristopher Brumnell, Joe McNulty, Tim Taylor, Ken Kinder, Mike Howe, Kasia Kozsiol, Eric Pospishil, Louis Svitek IV, Dan May, and Peter Falk.

4. On April 6, 2016, the Regional Director of Region 13 of the National Labor Relations Board approved a settlement agreement and notice reinstating the Shaw Crew employees disposing of the allegations in Case 13–CA–160319. In the accompanying Notice to Employees, Respondents agreed, among other things, to offer the Shaw Crew "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner."

5. On and after April 7, 2016, Respondents began offering work equally to the Shaw Crew and New Riviera Crew employees. By sharing the work opportunities at the Riviera Theatre with the New Riviera Crew employees, most Shaw Crew members received significantly less work than before they were discharged on September 16, 2015.

6. The March 28, 2016 settlement agreement between the General Counsel and Respondents to offer the Shaw Crew employees "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner" was patently ambiguous, establishes that there was no meeting of the minds between the parties on this issue, and is unenforceable.

REMEDY

The agreement in Case 13–CA–160319 between the General Counsel and Respondents to offer the Shaw Crew "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner" was ambiguous and unenforceable. That settlement agreement is an integral element of the allegations in this case. Accordingly, I shall recommend that the Board set aside the settlement in Case 13–CA–160319, reinstate those allegations, and remand this proceeding to the Division of Judges for a trial of both the reinstated allegations in Case 13–CA–160319 and those in the instant complaint, and to make the necessary findings, analysis, and conclusions of law.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The settlement agreement in Case 13–CA–160319 is set aside, the allegations in that complaint are reinstated and remanded to the Division of Judges for a trial of both the reinstated allegations in Case 13–CA–160319 and those in the instant complaint, and to make the necessary findings, analysis, and conclusions of law.

Dated, Washington, D.C. May 26, 2017

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.